

**Letter of Findings: 04-20100431**  
**Sales Tax**  
**For the 2007 and 2008 Tax Years**

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**ISSUE**

**I. Sales Tax—"Additional Taxable Sales"**

**Authority:** IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 9-13-2-42; [45 IAC 2.2-4-1](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax on its "vehicle sales" and on its "miscellaneous income."

**STATEMENT OF FACTS**

Taxpayer operates an auto repair business as a sole proprietorship. Taxpayer also sells vehicles and used equipment. Taxpayer registered with the Department of Revenue ("Department") for sales taxes. The Department conducted a review of Taxpayer's business records. After the audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed tax, interest, and negligence penalties for the 2007 and 2008 tax years. The Department determined that Taxpayer had made purchases without paying sales tax at the time of purchase or remitting use tax to the Department. The Department determined that Taxpayer had failed to collect sales tax on its sales of vehicles and had otherwise under-reported its taxable sales. Thus, the Department made sales tax assessments for the sales tax due on the "additional taxable sales." Taxpayer protested the imposition of sales tax on these "additional taxable sales" to the extent they related to Taxpayer's vehicle sales and Taxpayer's "miscellaneous income." Taxpayer also protests the derived "taxable sales percentage" claiming an error in the computations for the 2007 and the 2008 tax years. An administrative hearing was conducted, and this Letter of Findings results. Further facts will be supplied as required. The hearing officer prepared this Letter of Findings based upon the information contained within the Department's audit report and upon the additional information that taxpayer presented during the protest process.

**I. Sales Tax—"Additional Taxable Sales"**

**DISCUSSION**

As a threshold matter, all tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-4-1, in pertinent part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.

[45 IAC 2.2-4-1](#) further illustrates:

- (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".
- (b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
  - (1) The price arrived at between purchaser and seller.
  - (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
  - (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

Accordingly, Taxpayer, a retail merchant selling tangible personal property is responsible for collecting and remitting to the Department the sales tax due.

The Department conducted an audit of Taxpayer's available business records and sales tax returns. While Taxpayer provided a number of sales documents for each of the tax years, Taxpayer failed to produce complete

records for either of the tax years—i.e., Taxpayer had incomplete bank records, incomplete deposit records, and did not keep a sales journal. Moreover, the documents that were provided had discrepancies and reporting inconsistencies that led the Department to deem Taxpayer's reported sales data unreliable. Therefore, the Department used an alternative audit method to calculate taxable sales based upon the "best information available." See IC § 6-8.1-5-1(b) (providing when "the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available").

The Department determined that the most reliable information available were the Taxpayer's checking account deposits. This information was used as the basis of the alternative audit method to calculate taxable sales. First, the Department totaled the deposits in the business checking account and subtracted the cash advances from the credit cards, the amounts deposited from Taxpayer's personal funds, and the amounts received from Taxpayer's rental properties. Then, the Department added the credit cards sales that were deposited into a separate account. Next, the 2007 sales of vehicles and used equipment were separated and taxed in full as "additional taxable sales" for the vehicles and equipment. (This information was not available for 2008). Then, the total amount of the available sales invoices was subtracted to arrive at the "excess deposit amounts." Next, a "taxable sales percentage" was derived by taking the taxable amount of the available sales invoices divided by the total of these sales invoices. This taxable sales percentage was applied to the "excess deposit amounts" to arrive at an adjustment for other "additional taxable sales."

Therefore, the Department determined that Taxpayer had failed to collect sales tax on its vehicles and equipment sales and had otherwise under-reported its taxable sales. Thus, the Department made sales tax assessments for the sales tax due on these "additional taxable sales." Taxpayer protested the assessment disagreeing with the Department's determination that Taxpayer's had "additional taxable sales" to the extent they related to Taxpayer's vehicle sales and Taxpayer's "miscellaneous income." Taxpayer also protests the derived "taxable sales percentage" claiming an error in the computations for the 2007 and the 2008 tax years.

#### **A. Vehicle Sales.**

Taxpayer asserts that these sales of vehicles were conducted out of its home and not at its sole proprietorship vehicle repair business location. Taxpayer further asserts that since Taxpayer is not required to register as a licensed dealer under IC § 9-13-2-42, Taxpayer is not a dealer and is prohibited from charging sales tax on vehicle sales. Taxpayer claims that since it does not have a dealer's license, it cannot withhold sales tax on vehicle sales. Taxpayer, therefore, claims that since it cannot withhold sales tax on the vehicle sales, it cannot be responsible for withholding the sales tax on the vehicle sales. In effect, Taxpayer is arguing that its vehicle sales would qualify as a casual sale and were not made "in the ordinary course of its business."

However, Taxpayer is a registered retail merchant that every year buys vehicles and makes repairs to them with the intention of re-selling those same vehicles. Moreover, Taxpayer has failed to show that it entered into any of these transactions as anything other than "a retail merchant in the ordinary course of its business." For example, Taxpayer has not shown that it paid sales tax on its purchase of the vehicles, that it paid sales tax on the repair parts for the vehicles, that it used the tools and a location other than those of its vehicle repair business, and that it had titled the vehicles in its own name for its personal use. In fact, Taxpayer has provided no documentation to support its bare assertion that these sales were not sales made in the ordinary course of its business. Thus, Taxpayer has failed to meet its statutory burden under IC § 6-8.1-5-1(c) of demonstrating that the assessment is incorrect.

Therefore, Taxpayer's protest to the imposition of sales tax on its sales of vehicles is respectfully denied.

#### **B. "Miscellaneous Income"**

Taxpayer asserts that the certain of its cash deposits that were made into the business checking account were "miscellaneous receipts" that are either not receipts of the business or are not receipts that are subject to sales tax.

During the course of the protest, Taxpayer presented additional documentation for the 2007 and 2008 tax years that was not available at the time of audit, which was reviewed by the audit division after the audit during the protest process. Based upon this additional documentation, the Department is in agreement that, for the tax year 2007, Taxpayer received two loans in the amount of \$7,300 and \$3,800 that were included as "miscellaneous income." These amounts will be removed from "miscellaneous income" in a supplemental audit. Additionally, the Department has determined that the additional documentation provided for the 2008 tax year—i.e., additional documentation for the types of revenue deposits and for certain sales invoices—will be reviewed and taken into account in a supplemental audit. Taxpayer's protest as it relates to any other adjustments for the "additional taxable sales" for its "miscellaneous income" is denied. The file will be returned to the audit division for the completion of a supplemental audit where the audit division will make the adjustments that it deems appropriate.

Therefore, Taxpayer's protest to the imposition of sales tax on its "miscellaneous income" is denied in part and sustained in part subject to the results of a supplemental audit.

#### **C. "Taxable Sales Percentage"**

Taxpayer protests the derived "taxable sales percentage" claiming an error in the computations for the 2007

and the 2008 tax years. During the course of the protest, Taxpayer presented a revised calculation of the taxable amount of the "available invoices." The audit division is requested to examine the "available invoices" and verify the "taxable sales percentage" used to make the assessments for the 2007 and 2008 tax years. The file will be returned to the audit division for the completion of a supplemental audit where the audit division will make the adjustments, if any, that it deems appropriate.

Therefore, Taxpayer's protest to the imposition of sales tax resulting from an error in the "taxable sales percentage" is denied in part and sustained in part subject to the results of a supplemental audit.

#### **FINDING**

Taxpayer's protest to the imposition of sales tax on its vehicle sales is respectfully denied, as discussed in subpart A. Taxpayer's protest to the imposition of sales tax on its "miscellaneous income" is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in subpart B. Taxpayer's protest to the imposition of sales tax resulting from an error in the "taxable sales percentage" is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in subpart C. The file will be returned to the audit division for the completion of a supplemental audit where the audit division will make the adjustments that it deems appropriate.

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